

**United States Department of Labor
Employees' Compensation Appeals Board**

J.L., Appellant

and

**GOVERNMENT PRINTING OFFICE,
PUBLIC DOCUMENTS DEPARTMENT,
Washington, DC, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-1323
Issued: April 14, 2011**

Appearances:

*Thomas Van Tiem, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On April 12, 2010 appellant, through his representative, filed an application for review of a March 12, 2010 decision of the Office of Workers' Compensation Programs. The appeal was docketed as 10-1323. In its March 12, 2010 decision, the Office found that appellant did not meet his burden of proof to modify its December 7, 1979 wage-earning capacity determination.¹ The Office found that appellant had not shown that there was a material change in the nature and extent of his injury-related condition, that he had been retrained or otherwise vocationally rehabilitated or that the original determination was in fact erroneous.

¹ The Office accepted that on October 24, 1973 appellant, then a 27-year-old bookstore planner, sustained a lumbosacral strain and a herniated disc at L5-S1 due to lifting a heavy carton of books. He received compensation from the Office for periods of disability and was terminated from the employing establishment in July 1975. A March 12, 2001 statement of accepted facts indicates that the Office issued a decision on December 7, 1979 which adjusted appellant's compensation based on its determination that he could earn wages in the constructed position of order clerk. In his December 2009 request for modification of the Office's December 7, 1979 wage-earning capacity determination, appellant claimed that the Office's original December 7, 1979 determination was in fact erroneous because it had not been shown that he was physically able to perform the order clerk position or that it was reasonably available in his commuting area.

The Board has held that, once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.² The burden of proof is on the party attempting to show the award should be modified.³ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁴ When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁵

The Board, having reviewed the case record submitted by the Office, finds that the record is incomplete. It does not contain the December 7, 1979 wage-earning capacity decision of the Office. In addition, the record does not contain any documents produced by a vocational rehabilitation counselor authorized by the Office or an Office wage-earning capacity specialist from around the time of the Office's December 7, 1979 decision or any other documents relating to the Office's apparent determination that the constructed position of order clerk represented appellant's wage-earning capacity. For example, the record lacks any document showing that a vocational rehabilitation counselor or a wage-earning capacity specialist determined that appellant was vocationally and medically capable of performing the order clerk position or that it was reasonably available in the general labor market in his commuting area. The absence of these documents is significant as it precludes the Board from reviewing the grounds upon which

² *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

³ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁴ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1995).

the Office relied in determining that appellant did not meet his burden of proof to modify its December 7, 1979 wage-earning capacity determination.⁶

The Board finds that the case is not in posture for a decision as the record before the Board is incomplete and would not permit an informed adjudication of the case by the Board. The case must therefore be remanded to the Office to obtain these records and for further reconstruction and assemblage deemed necessary, to be followed by an appropriate decision on the merits to protect appellant's appeal rights.

IT IS HEREBY ORDERED THAT the March 12, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action in conformance with this order of the Board to be followed by an appropriate decision.

Issued: April 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁶ The record does contain some medical reports from around the time of the Office's December 7, 1979 decision, but it is unclear whether the record contains all the relevant medical evidence.